STATE OF MICHIGAN

COURT OF APPEALS

GLADYS MUNOZ,

Plaintiff-Appellee,

v

BASF and ED NUERNBERG,

Defendants/Third-Party-Plaintiffs-Appellants.

v

DISTINCTIVE MAINTENANCE, INC.,

Third-Party-Defendant.

UNPUBLISHED
May 24, 2005

No. 260046
Wayne Circuit Court
LC No. 03-335914-NO

Before: Bandstra, P.J., and Fitzgerald and Meter, JJ.

PER CURIAM.

In this premises liability case, defendants appeal by leave granted the trial court order denying their motion for summary disposition. This appeal is being decided without oral argument pursuant to MCR 7.214(E). We reverse.

Plaintiff, an employee of third-party defendant Distinctive Maintenance (DM), worked as a housekeeper at BASF's plant. In March 2001, a DM van transported plaintiff to her assigned building after her lunch break. As plaintiff exited the van she slipped on snow and ice in the parking lot and fell to the ground, sustaining injuries to her left knee and leg.

Plaintiff filed suit alleging that defendants negligently failed to maintain the premises in a reasonably safe condition and to warn of the unsafe condition. Defendants moved for summary disposition pursuant to MCR 2.116(C)(10), arguing that they owed no duty to plaintiff because the condition was open and obvious, and that no special aspects made the condition unreasonably dangerous in spite of its open and obvious nature. The trial court denied the motion without explanation.

We review de novo a trial court's decision on a motion for summary disposition. *Auto Club Group Ins Co v Burchell*, 249 Mich App 468, 479; 642 NW2d 406 (2001).

A premises liability claim requires that a plaintiff prove the following four elements: (1) a duty owed to the plaintiff by the defendant; (2) a breach of that duty; (3) causation; and (4) damages. *Hampton v Waste Mgt of Michigan, Inc*, 236 Mich App 598, 602; 601 NW2d 172 (1999). Plaintiff was an invitee on defendant's property at the time she fell and sustained injury to her knee and leg. *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 596-597; 614 NW2d 88 (2000). As a general rule, a landowner owes a duty to an invitee to exercise reasonable care to protect the invitee from an unreasonable risk of harm caused by a dangerous condition on the land. *Kenny v Kaatz Funeral Home, Inc*, 264 Mich App 99, 105; 689 NW2d 737 (2004). However, this duty does not generally extend to open and obvious dangers. *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 516; 629 NW2d 384 (2001). "'[W]here the dangers are known to the invitee or are so obvious that the invitee might reasonably be expected to discover them, an invitor owes no duty to protect or warn the invitee unless he should anticipate harm despite knowledge of it on behalf of the invitee.'" *Id*., quoting *Riddle v McLouth Steel Products Corp*, 440 Mich 85, 96; 485 NW2d 676 (1992). When determining if a condition is open and obvious, we consider whether "an average user with ordinary intelligence [would] have been able to discover the danger and the risk presented upon casual inspection." *Novotney v Burger King Corp (On Remand)*, 198 Mich App 470, 475; 499 NW2d 379 (1993).

This Court recently clarified that while the open and obvious doctrine is applicable to cases involving the accumulation of snow and ice, not all snow and ice accumulation is open and obvious as a matter of law. *Kenny, supra* at 106. As a general rule, and absent special circumstances, the hazards presented by ice and snow are open and obvious, and do not impose a duty on the property owner to warn of or remove the hazard. *Corey v Davenport College of Business (On Remand)*, 251 Mich App 1, 4-5, 8; 649 NW2d 392 (2002). The danger presented by snow-covered ice is open and obvious where, under the circumstances, an average person with ordinary intelligence would have been able to discover the condition and the risk it presented. *Id*. at 5. The test is objective and focuses not on whether the plaintiff should have known that the condition was hazardous, but rather on whether a reasonable person in the plaintiff's position would have foreseen the danger. *Id*., quoting *Joyce v Rubin*, 249 Mich App 231, 238-239; 642 NW2d 360 (2002).

In *Kenny, supra*, on which plaintiff relied below, the elderly plaintiff arrived at the defendant funeral home after dark, and slipped and fell on black ice hidden under snow in the parking lot. *Kenny, supra* at 101-103. This Court held that the trial court erred in granting the defendant's motion for summary disposition because, under the circumstances presented by the case, "reasonable minds could differ regarding the open and obvious nature of black ice under snow." *Id*. at 108, 112. This Court emphasized that no evidence showed that previous rainfall or thawing might have put a reasonably prudent person on notice that ice might have existed beneath the snow, and that several persons fell at approximately the same time as the plaintiff. *Id*. at 108. This Court found that a question of fact existed regarding whether a reasonably prudent person would have recognized the danger presented by the snow-covered lot upon casual inspection. *Id*. Further, this Court held that, even assuming that the condition was open and obvious, a question of fact existed as to whether special aspects made the condition unreasonably dangerous because the parking space in which the plaintiff fell was the only one remaining when the vehicle in which she was a passenger arrived at the funeral home. *Id*. at 112-113.

Kenny, *supra*, is distinguishable from this case, and does not support the trial court's denial of defendants' motion for summary disposition. Plaintiff acknowledged that when she arrived at work in the morning, she observed that snow covered the ground, including the parking lots surrounding BASF's buildings. Moreover, plaintiff here, unlike the plaintiff in *Kenny*, *supra*, acknowledged that rain had fallen on the morning of the accident, and that the rain had turned into snow at some point in the morning. Therefore, under the circumstances, a reasonably prudent person would have been aware that ice could exist under the snow. *Joyce*, *supra* at 239-240. The fact that plaintiff did not actually see the ice until after she fell was irrelevant. *Novotney*, *supra* at 475. The trial court erred in finding that the danger presented by the presence of snow-covered ice in BASF's parking lot was not open and obvious. *Corey*, *supra* at 5.

Further, we conclude that plaintiff failed to demonstrate the existence of any special aspects that made the condition unreasonably dangerous in spite of its open and obvious nature. *Id*. at 6. In contrast to *Kenny*, *supra*, no evidence in this case showed that plaintiff was dropped off in the only available spot in the delivery area of the parking lot next to the building in which she worked. No evidence showed that other DM employees fell at the same time as plaintiff. The condition was not so unreasonably dangerous that it created a risk of death or severe injury. Cf. *Lugo*, *supra* at 518; *Corey*, *supra* at 6-7 (falling several feet down ice-covered steps does not meet *Lugo* standard for unreasonable danger). Defendants were entitled to summary disposition, and the trial court erred in denying their motion.

We reverse.

/s/ Richard A. Bandstra
/s/ E. Thomas Fitzgerald
/s/ Patrick M. Meter